

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CASE NO. 1:23-cv-00261-MR**

NATALIE L. MILLER,)	
)	
Petitioner,)	
vs.)	<u>ORDER</u>
)	
TODD ISHEE, Secretary,)	
North Carolina Department of)	
Adult Correction,¹)	
)	
Respondent.)	
_____)	

THIS MATTER comes before the Court on initial review of the Petition for Writ of Habeas Corpus filed by the Petitioner pursuant to 28 U.S.C. § 2254 [Doc. 1] and the Petitioner’s Motion to Proceed *In Forma Pauperis* [Doc. 5].

I. PROCEDURAL BACKGROUND

Natalie L. Miller (the “Petitioner”) is a prisoner of the State of North Carolina. The Petitioner was convicted in Henderson County Superior Court on November 14, 2022, of one count of second-degree murder and one

¹ Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts requires that “the petition must name as respondent the state officer who has custody” of the petitioner. Rule 2(a), 28 U.S.C. foll. § 2254. North Carolina law mandates that the Secretary of the North Carolina Department of Adult Correction is the custodian of all state inmates. See N.C. Gen. Stat. § 148-4 (2023). Accordingly, Todd Ishee, the current Secretary of the North Carolina Department of Adult Correction, is the proper respondent in this action.

count of concealment of death. [Doc. 1 at 1]. The Petitioner received a sentence of 38 years of imprisonment. [Id.].

The Petitioner filed a post-conviction motion for appropriate relief (“MAR”) in the Henderson County Superior Court on September 1, 2023. [Id. at 3]. That motion is still pending in state court. [Id.].

The Petitioner filed the instant § 2254 petition in the U.S. District Court for the Eastern District of North Carolina on September 1, 2023. [Id. at 1]. The petition was transferred to this Court pursuant to 28 U.S.C. § 2241(d) on September 5, 2023. [Doc. 2]

On September 27, 2023, the Petitioner filed a Motion to Proceed *In Forma Pauperis*. [Doc. 5]. However, the docket reflects that the Petitioner’s filing fee was received by this Court on September 15, 2023.

II. DISCUSSION

A. Motion to Proceed *In Forma Pauperis*

Rule 3(a) of the Rules Governing Section 2254 Cases requires that a petition be accompanied by the applicable \$5.00 filing fee or motion for leave to proceed *in forma pauperis*. Federal courts may excuse the required fees if the if the litigant demonstrates that he cannot afford to pay. 28 U.S.C. § 1915(a)(1). Because this Court was in receipt of the Petitioner’s filing fee

before she moved to proceed *in forma pauperis*, this Motion will be denied as moot.

B. Initial Review of § 2254 Petition

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a state prisoner seeking federal review of his state conviction must exhaust his available state remedies before pursuing habeas relief in federal court. 28 U.S.C. § 2254(b)(1)(A). The prisoner bears the burden of proving exhaustion. Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998).

In North Carolina, a petitioner may satisfy § 2254’s exhaustion requirement by directly appealing his conviction to the North Carolina Court of Appeals and then petitioning the North Carolina Supreme Court for discretionary review or by filing a state post-conviction proceeding and petitioning the North Carolina Court of Appeals for a writ of certiorari. See N.C. Gen. Stat. § 7A–31; N.C. Gen. Stat. § 15A–1422.

Here, the Petitioner has failed to exhaust state court remedies as required under § 2254 because her MAR is still pending in Henderson County Superior Court. Only once that motion has been resolved, and all other state remedies have been exhausted can this Court reach the merits of the Petitioner’s claim. As such, the Court will dismiss the petition without

prejudice and allow the Petitioner to refile her petition upon the exhaustion of her state remedies.

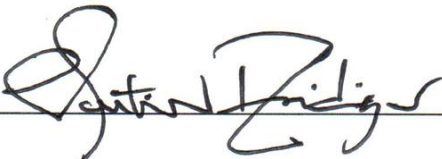
ORDER

IT IS, THEREFORE, ORDERED that:

1. The Petitioner's Motion to Proceed *In Forma Pauperis* [Doc. 5], filed on September 27, 2023, is **DENIED AS MOOT**.
2. The Petitioner's § 2254 Petition for Writ of Habeas Corpus [Doc. 1] is **DISMISSED WITHOUT PREJUDICE**.
3. The Clerk of Court is respectfully directed to substitute Todd Ishee, Secretary of the North Carolina Department of Adult Correction as a proper Respondent in this action.

IT IS SO ORDERED.

Signed: November 8, 2023



Martin Reidinger
Chief United States District Judge

